Supreme Court, U.S.
FILED
FEB 5 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY

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February 5, 1991

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QUESTIONS PRESENTED

1. Whether a railroad's ownership of a rail line is a "working condition" under § 6 of the Railway Labor Act, 45 U.S.C. § 156, such that the sale of the line is a mandatory subject of collective bargaining.

2. Whether this Court should decide whether or not the express and implied agreements between the Chicago & North Western Transportation Company and its unions apply to line sales.

3. Whether the proposal by a union to alter a collective bargaining agreement that gives a railroad the right to sell a rail line deprives the railroad of that right during negotiations over the proposal.

RULE 29.1 STATEMENT

Respondent Chicago & North Western Transportation Company is a wholly-owned subsidiary of CNW Corporation, which is wholly-owned by Chicago & North Western Acquisition Corporation, which is wholly-owned by Chicago & North Western Holdings Corporation. Union Pacific Corporation holds 100% of the non-voting preferred stock of Chicago & North Western Holdings Corporation. Respondent Chicago & North Western Transportation Company has the following subsidiaries apart from wholly-owned subsidiaries within the meaning of Rule 29.1 of this Court: Iowa Transfer Railway Company, Kansas City Terminal Company, MT Properties, Inc., Peoria & Pekin Union Railway Company, Trailer Train Company, Transportation Data Exchange, Inc., ACE Limited, Railroad Association Insurance, Ltd., Transportation & Railroad Assurance Company, Ltd., Transportation Quality Systems, Inc. and C&NW Realco, Inc.

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BRIEF IN OPPOSITION FOR RESPONDENT CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY

INTRODUCTION

The Railway Labor Act ("RLA") divides all labor disputes over "rates of pay, rules, or working conditions" into two categories: major disputes under § 6 over proposals to change or create collective bargaining agreements; and minor disputes under § 3 over the interpretation or application of existing agreements.[1] In a major dispute, the parties are subject to a reciprocal status quo obligation, which prohibits the carrier from unilaterally

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[1] 45 U.S.C. § 156, 153 First(i). See, *e.g.*, *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723-25 (1945).

implementing changes it proposes and the union from striking to enforce its demands until the Act's collective bargaining procedures have been exhausted.[2] In a minor dispute, the carrier is free to apply its interpretation of its agreements unless that interpretation is rejected by an arbitration board, whose jurisdiction is exclusive, and because of the exclusivity of the arbitration remedy, strikes over minor disputes are unlawful.[3] There is no disagreement between labor and management, or among the federal courts, about these fundamental principles (see Petition for Certiorari ["Pet."] at 4 n.5), but until recently there has been some uncertainty about how these principles apply when a rail carrier proposes to sell its lines and its unions propose to change the applicable labor agreements to restrict the carrier's rights in that regard.

In June 1989, however, this Court issued two landmark decisions under the RLA. In *Pittsburgh & Lake Erie R.R.* v. *RLEA*, 109 S. Ct. 2584 (1989) ["*P&LE*"], the Court held that a carrier's sale of its entire line is *not* a change in working conditions subject to the RLA's major dispute and status quo provisions, even though a major dispute may exist simultaneously over union proposals to change the carrier's existing agreements to protect employees from the effects of the sale. In *Consolidated Rail Corp.* v. *RLEA*, 109 S. Ct. 2477 (1989) ["*ConRail*"], the Court held that where a union seeks a status quo injunction against an action that the carrier claims is justified by its existing labor agreements, if the carrier's interpretation of the agreements is at least "arguable" or "not obviously insubstantial," the dispute between the parties is minor and the courts lack jurisdiction.

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[2] See *Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1960); *Railway Clerks* v. *Florida E. C. R. Co.*, 384 U.S. 238, 246 (1966).

[3] See *Trainmen* v. *Chicago, R. & I. R. Co.*, 353 U.S. 30, 42 (1957).

Since these decisions came down, the Railway Labor Executives' Association and its affiliated unions (petitioners here, collectively referred to as "RLEA") have challenged several partial line sales. All of the courts of appeals that have passed upon the issue have rejected RLEA's claim that such sales give rise to major disputes and status quo violations, relying either upon *P&LE* or *ConRail* or both, as the Seventh Circuit did below.[4] Nonetheless, RLEA asserts that the Court should grant certiorari in this case to "finish the work which it began in *Pittsburgh & Lake Erie*" and to straighten out the courts of appeals, which RLEA claims are "hopelessly at odds" with each other and with this Court over the major/minor dispute dichotomy in the line sale context. (Pet. at 17, 24.) As we shall demonstrate, this is simply not the case.

STATEMENT OF THE CASE

1. *C&NW's Down-sizing.* For many years, respondent Chicago & North Western Transportation Company ("C&NW") has been unable to earn sufficient revenues from railroad operations to meet the statutory test of "revenue adequacy" under the Interstate Commerce Act.[5] To avoid financial collapse, C&NW has engaged in a massive and long-standing plant rationalization program, discontinuing operations on marginal lines that were sapping the vitality of the carrier's entire system.

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[4] *RLEA* v. *Chicago & N.W. Transp. Co.*, 890 F.2d 1024, 1025 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 3237 (1990); *CSX Transp., Inc.* v. *United Transp. Union*, 879 F.2d 990 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 720 (1990); *General Committee of Adjustment* v. *CSX R.R.*, 893 F.2d 584 (3d Cir. 1990); *RLEA* v. *Chesapeake & W. Ry.*, 915 F.2d 116 (4th Cir. 1990), *cert. petition pending*, No. 90-1131.

[5] 49 U.S.C. § 10704(a)(2). See *e.g.*, *Railroad Revenue Adequacy—1988 Determination*, 6 I.C.C.2d 933 (1990); *Railroad Revenue Adequacy—1987 Determination*, 4 I.C.C.2d 731 (1988); *Railroad Revenue Adequacy—1986 Determination*, 3 I.C.C.2d 966 (1987); *Railroad Revenue Adequacy—1985 Determination*, 3 I.C.C.2d 541 (1987).

C&NW did this in part through abandonments of such lines, under authority granted by the Interstate Commerce Commission ("ICC"), which has jurisdiction over abandonments and all other rail line transactions. 49 U.S.C. §§ 10901, 10903, 10905, 11343. During the 20-year period preceding the line sale in this case, C&NW nearly halved the size of its system through such discontinuances, abolishing thousands of jobs as a result, all without protest by the unions under the RLA. (Pet. at 1a-2a.)

In 1985, the ICC gave carriers in C&NW's position an alternative to abandonments, by adopting an expedited authorization procedure for line sales to new entrants into the railroad industry. *Ex Parte No. 392*, 1 I.C.C.2d 810 (1986), *aff'd mem. sub nom. Illinois Commerce Comm'n* v. *United States*, 817 F.2d 145 (Table) (D.C. Cir. 1987). While abandonments bring about permanent cessation of operations and thus permanent job loss, railroad operations and job opportunities for rail employees continue after sales to new railroads; accordingly, the ICC determined not to impose upon the parties to such sales the labor protective conditions that are imposed in abandonments. *Id.* at 815.

In 1987, C&NW agreed to sell some 208 miles of track in Wisconsin, known as the Duck Creek South lines, to a new company, the FRVR Corporation, under the ICC's *Ex Parte No. 392* procedure. The Duck Creek South lines were economically marginal, and the ICC determined that they had a significant "potential [for] future abandonment" unless they were sold to a new operator.[6]

Approximately 329 union employees worked on the Duck Creek South lines. Their jobs were subject to abol-

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[6] *FRVR Corp.—Exemption Acquisition & Opposition—Certain Lines of Chicago & N.W. Transp. Co.*, ICC Finance Docket No. 31205, slip op. p. 9 (served Jan. 29, 1988), *vacated on other grounds*, 888 F.2d 1277 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1808 (1990).

ishment upon consummation of the sale. Force-reduction provisions in C&NW's collective bargaining agreements allow the carrier to abolish jobs at its discretion upon specified notice to affected employees. The agreements also allow employees whose jobs are abolished to "exercise their seniority" to other available jobs on the railroad and provide other benefits for employees for whom no other jobs are available, including recall rights and continuation of their health insurance for four months. (C&NW S.A. at 1-2, 82.)[7] C&NW anticipated that all of the Duck Creek South employees would be able either to exercise seniority to vacant positions elsewhere on the railroad or to take jobs with FRVR, which offered C&NW incumbents a right of first hire. (C&NW S.A. at 66-68.)[8]

2. *The Unions' Demands.* When the unions learned of the proposed sale to FRVR, they served C&NW with a series of notices, ostensibly under RLA § 6, seeking to change their existing collective bargaining agreements to increase substantially C&NW's obligations to employees who would be affected by the sale. These notices included demands that C&NW alter its arrangement with FRVR to require FRVR to recognize C&NW's unions and assume its collective bargaining agreements, and that C&NW defer consummation of the sale until it reached "implementing" agreements with the unions, as well as demands that C&NW provide all affected employees with monetary benefits. (RLEA S.A. at 30-32.)

C&NW responded that the unions' notices were not subject to mandatory bargaining under the RLA, because, among other things, the notices sought to limit

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[7] "C&NW S.A." and "RLEA S.A." refer, respectively, to the Supplemental Appendices C&NW and RLEA filed with the court of appeals.

[8] As it happened, when the sale was consummated only four C&NW employees were either unwilling or unable to hold other railroad jobs with C&NW or FRVR. (C&NW S.A. at 82.)

C&NW's managerial prerogative to sell its lines. (Pet. at 15; see RLEA S.A. at 30-32.) Without prejudice to that position, however, C&NW attempted to negotiate with the unions, offering $30,000 severance pay to any employee deprived of a railroad job as a result of the sale. (C&NW S.A. at 8, 69-70.) RLEA rejected the carrier's offer, and C&NW then requested mediation from the National Mediation Board under RLA § 5 First, 45 U.S.C. § 155 First (the second step, after direct negotiations, in the major dispute procedures). The disputes over the union notices are now before the Board.[9]

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[9] Without any record support, RLEA suggests that C&NW has failed to bargain in good faith, because no mediation has occurred yet, allegedly "because of the dispute over the validity" of the union notices. (Pet. at 11 n.15.) C&NW has no control over the timing of mediation. The Mediation Board claims virtually unlimited discretion over the timing and progress of mediation. See *Int'l Ass'n of Machinists* v. *National Mediation Board*, 425 F.2d 527 (D.C. Cir. 1970). It has been known to delay mediation for years, and will not disclose its reasons for delay in any particular case. See, *e.g.*, *Boston & Maine Corp.* v. *National Mediation Board*, 669 F. Supp. 1, 2 (D.D.C. 1987). The Board has made no such disclosure in this case.

RLEA also asserts that C&NW and other carriers have refused to bargain over line sale demands served nationally upon all the major railroads in 1988, which were referred by Executive Order No. 12,714 to Presidential Emergency Board No. 219 under § 10 of the RLA, 45 U.S.C. § 160. (See Pet. at 11 n.15, 16 & n.18.) That is incorrect. While the carriers maintain that bargaining over line sales themselves is not mandatory, they recognize that they may be obliged to bargain over the *effects* that sales may have upon employees. Thus, C&NW and the other carriers responded to the unions' national notices with a counterproposal intended to provide additional protection to employees, including an offer of up to one year's pay as a severance allowance to any employee deprived of employment with his home railroad because of a line sale to a new railroad. Presidential Emergency Board No. 219, Carriers' Ex. 76 at ii. The unions rejected the carriers' counterproposal. The Emergency Board declined to recommend any additional benefits for employees affected by line sales. Presidential Emergency Board No. 219, *Report to the President* p. 116 (Jan. 15, 1991).

When C&NW scheduled the sale for consummation in March, 1988, the unions threatened to strike to block the sale.

3. *The Course of Litigation Below.* C&NW sought a preliminary injunction against the strike, and RLEA moved for a preliminary injunction to prohibit the sale. C&NW argued (a) that its existing agreements, both express and those implied from its past practice of unilaterally discontinuing its operations on economically weak lines, authorized the exercise of its managerial prerogative to sell lines and the related job abolishments, and (b) that a carrier does not lose its contractual rights, which are part of and define the status quo, simply because a union serves a notice proposing to change the contracts. Therefore, C&NW contended, while the disputes as to whether the agreements should be *changed* might be major if the unions' proposals related to rates of pay, rules, or working conditions, the quite distinct dispute over the carrier's *existing* rights during the status quo period is minor, because that dispute turns upon the "interpretation or application" of the agreements then in effect. 45 U.S.C. § 153 First (i).

RLEA claimed that the service of the union notices had the effect of taking away C&NW's right to consummate the sale pending bargaining. RLEA conceded that the sale did not violate any of the parties' existing express and implied labor agreements, and that these agreements (including their protective provisions), unless changed, applied to and would govern the effects that the sale would have upon employees. (See Pet. at 51a.) But RLEA maintained that the "working conditions" covered by the status quo pending bargaining over proposed changes in agreements include "employment terms that are not the subject of an agreement, either express or implied" and that C&NW's "managerial prerogative to sell its rail lines" is one such "non-agreement condi-

tion." [10] In other words, according to RLEA, even if a railroad's express and implied labor agreements do not limit one of the railroad's management prerogatives, the railroad may not exercise that prerogative once it becomes the subject of a union § 6 notice.

The district court held that C&NW's interpretation of its agreements as authorizing the sale and job abolishments was at least arguably correct and that RLEA's status quo claim therefore presented a minor dispute. Accordingly, the court preliminarily enjoined the threatened strike and denied RLEA's request for a preliminary injunction against the sale. (See Pet. at 44a.) The Seventh Circuit affirmed. (Pet. at 52a-53a.) This Court denied RLEA's petition for review. 488 U.S. 966 (1988), *rehearing denied*, 488 U.S. 1051 (1989). The line sale was then consummated on December 3, 1988.

In June 1989, while this case was pending before the district court on a summary judgment motion by C&NW, this Court held that a carrier's decision to sell its entire line is "so much a managerial prerogative that only an unmistakable expression of congressional intent will suffice to require the employer to postpone a sale of its assets pending the fulfillment of any duty it may have to bargain over the subject matter" of union § 6 notices served in response to the sale. *P&LE*, *supra*, 109 S. Ct. at 2595-96. This Court found no expression of such congressional intent in § 6 of the RLA, notwithstanding the prior decision in *Shore Line* v. *Transportation Union*, 396 U.S. 142, 153 (1969), which interpreted § 6 as requiring a carrier in a major dispute "to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose * * *." The Court distinguished *Shore Line* on two grounds: (1) *Shore Line* "did not involve a proposal by the rail-

[10] Brief for Appellants Railway Labor Executives' Association, *et al.* (7th Cir.) pp. 28, 30.

road to terminate its business," which is "not a change in the conditions of employment," *id.* at 2494, 2496; and (2) the carrier in *Shore Line* had attempted to change a past practice that had been "unquestioned * * * for many years," so that it had become an implied term in the parties' collective bargaining agreement. *Id.* at 2594, 2593. In addition, the Court held that the carrier's bargaining obligation with respect to union § 6 notices extended only to the effects of the sale on employees, and not to the fundamental managerial decision whether or not to sell. *Id* at 2597.

The district court in this case thereafter entered final judgment, making the strike injunction permanent, dismissing RLEA's status quo claim, and denying a request by RLEA for an order compelling C&NW to bargain with the unions. (Pet. at 34a.)

4. *The Decision Below.* The Seventh Circuit affirmed. It upheld the strike injunction, because § 6 forbids the unions to strike over their demands to change agreements "until the procedures for peaceful settlement established in that section are exhausted, and they have not been * * *"; and because any strike to block C&NW from acting on its asserted contractual rights with respect to the sale would also be unlawful under § 3, which forbids strikes over minor disputes. (Pet. at 23a-25a.) The court also upheld the dismissal of RLEA's status quo claim, holding that there were three wholly adequate and independent grounds for concluding that C&NW did not violate the status quo when it consummated the Duck Creek South sale. (Pet. at 16a.)

First, the court held that C&NW's decision to sell came within the carrier's fundamental managerial prerogatives, which are not subject to mandatory bargaining or status quo obligations under the RLA, as this Court recognized in *P&LE*. That is because the bargaining and status quo provisions under § 6 apply only to changes in "rates of pay, rules, and working conditions" (45 U.S.C.

§ 156); but a carrier's economically motivated decision to sell a line is "not a decision about the utilization of labor or about wages, work rules, working conditions, job rights, etc. It is a decision to reduce the extent of the railroad's business, akin to a manufacturer's decision to curtail its output * * *." (Pet. at 13a.) Under *P&LE*, C&NW is obliged to bargain over the effects of the sale in response to proper union § 6 notices, but not over the decision to sell.[11] Thus, the court held that there was no major dispute over the sale itself, and the sale could not violate any status quo obligation arising from union "effects" demands because "the relevant holding of [*P&LE*] * * * is that the right to demand 'effects bargaining' does not entitle the union[s] to prevent the sale." (Pet. at 14a.)

Second, the court held that even if C&NW *did* have a duty to bargain over the sale, the sale still did not violate the status quo. That is because under *P&LE's* reading of *Shore Line*, the status quo is defined by the collective bargaining agreements. (Pet. at 16a-17a.) Hence, there could be no violation, because RLEA concedes that the sale did not violate any of the parties' express or implied labor agreements. (See Pet. at 12.)

Third, the Seventh Circuit held that even if, as RLEA contended, the § 6 status quo obligation forbids a carrier from changing working conditions that are *not* covered by the parties' express or implied agreements, C&NW still had not violated the status quo. That conclusion followed from the court's ruling that C&NW was at least arguably correct in contending that the sale was authorized by its collective bargaining agreements, including implied agreements derived from the carrier's extensive

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[11] C&NW did not deny this obligation and was indeed bargaining over the unions' § 6 notices, and the court therefore held that the district court rightly denied the unions' request for a bargaining order, because "no order is needed to compel what is already being done * * *." (Pet. at 15a-16a.)

past practice of discontinuing operations on abandonable lines. (Pet. at 19a.)[12] Thus, under *ConRail, supra*, any disagreement by the unions on that interpretation of C&NW's contractual rights gave rise to an arbitrable minor dispute, in which the district court could not grant a status quo injunction and over which the unions may not strike. 109 S. Ct. at 2480-84. If the unions do *not* dispute the carrier's interpretation, then their only recourse is to "try to change the agreement for the future, by filing a § 6 notice," but they cannot strike to "break the contract" without first exhausting the major dispute procedures. (Pet. at 24a-25a.)

In short, C&NW did not violate the status quo and the unions were not entitled to strike for any or all of the reasons that (1) the sale was committed to managerial prerogative, and was not subject to mandatory bargaining; (2) the collective bargaining agreements did not expressly prohibit the sale, leaving C&NW free to consummate it; and (3) the agreements can be read positively to confer on the carrier the right to make the sale.

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[12] The court also relied upon RLEA's concession that the Duck Creek South sale did not violate any collective bargaining agreements, for "[w]hat the agreements do not expressly or impliedly forbid they permit * * *." (Pet. at 21a.)

ARGUMENT

I. THE RULING BELOW THAT C&NW'S OWNERSHIP OF THE LINE WAS NOT A "WORKING CONDITION" DOES NOT WARRANT REVIEW

The Seventh Circuit's managerial prerogative holding is fully consistent with decisions of this Court, including *P&LE*, and is required by the RLA itself. The bargaining and status quo obligations under RLA § 6 apply *only* to "rates of pay, rules, and working conditions." 45 U.S.C. § 156. A carrier's ownership of its lines and other assets is none of these things. It is clearly not a "rate of pay" or a "rule," and it cannot be a "working condition," for *P&LE* held that a carrier's decision to sell its entire line "is not a change in the conditions of employment" subject to the RLA's bargaining and status quo provisions. 109 S. Ct. at 2596. If a carrier's ownership of its lines is not a working condition, then no change in that ownership, whether partial or entire, is a change in "working conditions" under RLA § 6, and no change in ownership can violate the status quo under *any* reading of *Shore Line*.

This conclusion follows from *P&LE* itself, even though that case did not involve a partial line sale. In holding that a carrier's sale of its entire line is not a change in working conditions under § 6, the Court drew upon the doctrine of management prerogative under the National Labor Relations Act ("NLRA"): Some employer decisions, despite their effects upon employees, are " 'so peculiarly matters of management prerogative' " that they cannot be considered "terms and conditions of employment" subject to mandatory bargaining and status quo obligations under § 8(d) of the NLRA, 29 U.S.C. § 158(d). 109 S. Ct. at 2595 & n.17, *quoting Textile Workers* v. *Darlington*, 380 U.S. 263, 267 (1965) and *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 686 (1981).

First National Maintenance held that this management prerogative extends to an employer's economically motivated decision to discontinue a part of its business, because such a decision involves "a change in the scope and direction of the enterprise" and "is akin to the decision whether to be in business at all." 452 U.S. at 677. Such a decision may result in the elimination of jobs and the employer must bargain over such effects on employees—but *not* over the decision itself: "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. * * * [I]n view of an employer's need for unencumbered decisionmaking * * * the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." *Id.* at 678-79, 686. Thus, an employer's decision to close down part of its business "is *not* part of § 8(d)'s 'terms and conditions,' * * * over which Congress has mandated bargaining." *Id.* at 686 (original emphasis).

There is no basis for a different result under the RLA. A railroad, no less than any other employer, needs the freedom to determine "the scope and direction of [its] enterprise." 452 U.S. at 677. Prohibiting a carrier from consummating a line sale and thereby shutting down a part of its business until it either obtains the unions' consent to the sale or exhausts the RLA major dispute procedures, which this Court has aptly characterized as "virtually endless," [13] would substantially encumber the carrier's property rights in its lines.[14] The RLA phrase

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[13] *Burlington N. R. Co.* v. *Maintenance of Way Employes*, 481 U.S. 429, 444 (1987).

[14] Property ownership carries with it a "group of rights," including the right to "*dispose of* it." *United States* v. *General Motors Corp.*, 323 U.S. 373, 377-88 (1945) (emphasis added).

"working conditions" cannot be construed to do that if, as this Court held in *First National Maintenance*, the NLRA phrase "terms and conditions of employment" does not encumber the property of other employers. "Working conditions" on its face is no broader than "terms and conditions of employment," and if anything is narrower, as the legislative history of the NLRA indicates. In 1947, when the Taft-Hartley amendments to the NLRA were debated, the Senate considered borrowing the term "working conditions" from the earlier RLA to define the scope of mandatory bargaining for non-rail employers, but Senator Wagner (a principal sponsor of the NLRA), objected that by "substituting the narrower term 'working conditions' for the present broader term 'conditions of employment,' the bill would narrow the scope of collective bargaining to exclude many subjects * * *." 93 Congressional Record 3322, 3323 (1947). Thus, it has long been accepted under the NLRA that a "comparison of the language of the two Acts shows that Congress in the [NLRA] must have intended a bargaining provision of broader scope than that contemplated in the [RLA]," because "it is obvious that the phrase which it later used is more inclusive than that which it had formerly used." *Inland Steel Co.* v. *NLRB*, 170 F.2d 247, 254-55 (7th Cir. 1948), *aff'd on other grounds sub nom. American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950).

RLEA purports to find support for a contrary result in *Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960), which RLEA reads as holding that a partial "business closure" is a mandatory bargaining subject. (Pet. at 13, 17.) *Telegraphers*, however, did not involve a "business closure" of any kind. There, the railroad proposed to consolidate clerical functions performed at local stations along certain lines, reducing jobs along those lines while continuing to conduct the same business on them. On these facts, as *P&LE* recounts, "a closely divided Court" held that the railroad's proposal to "abol-

ish some jobs was a bargainable issue." 109 S. Ct. at 2595 & n.17; see 362 U.S. at 332-41. *P&LE* then specifically distinguished *Telegraphers* on grounds that are equally applicable to C&NW's decision to leave the market served by the Duck Creek South lines: that *Telegraphers* did not deal "with a railroad's freedom to leave the market." 109 S. Ct. at 2595 n.17.

The Seventh Circuit's decision that the partial line sale in this case was not a change in "working conditions" does not conflict with any decisions of this Court or other courts of appeals.[15] RLEA's request that this Court grant certiorari to decide whether *P&LE*'s managerial prerogative holding applies to a partial "business closure" (Pet. at 17) should be denied.

II. THE RULING BELOW THAT THE STATUS QUO IN A MAJOR DISPUTE IS DEFINED BY THE EXISTING LABOR AGREEMENTS DOES NOT WARRANT REVIEW

The Seventh Circuit's second alternative holding, that C&NW's status quo obligation pending any major dispute over the union § 6 notices was defined by the collective bargaining agreements, simply echoed this Court's reading in *P&LE* of its prior decision in *Shore Line*. RLEA maintains that the Seventh Circuit effectively overruled *Shore Line*, which RLEA reads as extending the status quo obligation to "non-agreement" conditions

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[15] Only one other court of appeals, the Eighth Circuit, has addressed the question whether partial line sales are covered by P&LE's managerial prerogative holding. The Eighth Circuit case, which involved a prior partial line sale by C&NW and a resulting status quo claim by RLEA, held that under *P&LE*, "C&NW was not required to bargain over the sale in this case prior to the sale's completion * * * nor was it obligated to maintain the status quo and postpone the sale," even though the carrier does have an obligation to bargain with the unions with respect to "the *effects that the sale* might or will have on its employees." *RLEA* v. *Chicago & N.W. Transp. Co., supra,* 890 F.2d at 1025 (original emphasis). The Seventh Circuit reached exactly the same conclusion below.

—*i.e.*, those not addressed by the parties' express and implied agreements—and hence to prohibit a carrier from taking actions that the collective bargaining agreement "neither authorizes nor prohibits." (Pet. at i-ii.) Even if RLEA were right on that score, however, the question whether the § 6 status quo allows carriers to take actions that are neither authorized nor prohibited by their agreements is presented in this case in an entirely abstract and academic way. That is so because the court of appeals ruled that C&NW was arguably correct in contending that its labor agreements, including implied agreements derived from its extensive past practice of abandoning lines, affirmatively gave it the right to make the sale—a ruling RLEA does not contest. (See Pet. at 12 n.16.) It would look very much like an advisory opinion for this Court to reach RLEA's argument as to the scope of the § 6 status quo, and render a decision concerning the effect of labor agreements that are silent on an issue, without first deciding whether or not the agreements really *are* silent. But that threshold question cannot be decided by a court in this case. Whether the agreements are silent, or, as C&NW plausibly contends, they positively authorized the sale, is a minor dispute committed to the exclusive jurisdiction of an arbitration board. *ConRail*, *supra*, 109 S. Ct. at 2481.

In short, unless this Court were to overrule *ConRail* and its numerous earlier decisions holding that courts may not adjudicate the merits of minor disputes,[16] *and* undertake a review of the parties' written and implied collective bargaining agreements, *and* hold that those agreements do not address line sales (as they plainly do), it is hard to see how the Court would ever reach the question whether the § 6 status quo applies to "non-agreement" conditions. Thus, that question is presented too abstractly in this case to warrant review. See

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[16] See, *e.g.*, *Andrews* v. *Louisville & N. R. Co.*, 406 U.S. 320, 325 (1972); *Locomotive Engineers* v. *Louisville & N. R. Co.*, 373 U.S. 33, 38 (1963).

The Monrosa v. *Carbon Black, Inc.*, 359 U.S. 180, 183-84 (1959).

Even if the question could be reached, it does not warrant review, because the Seventh Circuit's view of *Shore Line* was correct.[17] In that case, the carrier's train crews had traditionally reported to work at its Lang Yard, and the carrier attempted to change the reporting point while a union § 6 notice seeking to prohibit such changes was pending. 396 U.S. at 145. This Court held that the change violated the § 6 status quo because it altered the "objective working conditions" in effect before the major dispute over the union notice arose. *Id.* at 153. The carrier's formal written agreement with the union did not prohibit the change, but, as this Court explained in *P&LE*, "the prior practice, the objective working condition, was to have crews report for work and come back at Lang Yard. * * *[R]eporting at Lang Yard, we thought, had been the unquestioned practice for many years, and we considered it reasonable for employees to deem it sufficiently established that it would not be changed without bargaining and compliance with the status quo provisions of the RLA." 109 S. Ct. at 2594.

As this Court noted in a case arising under the NLRA, the "practices of the industry and the shop [are] equally a part of the collective bargaining agreement although not expressed in it." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). The same rule—which is universally accepted general contract law[18]—applies under the RLA. See, *e.g.*, *ConRail*, *supra*, 109 S. Ct. at 2485; *Transportation Union* v. *U.P. R. Co.*, 385 U.S. 157, 161 (1966). *Shore Line* did not reject this principle. On the contrary, the Court there acknowledged that where an established working condition "is

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[17] There are no conflicts among the circuits. The Seventh Circuit is the *only* court of appeals that has addressed this question after *P&LE*.

[18] See, *e.g.*, Restatement (Second) of Contracts § 223 (1981).

satisfactorily tolerable to both sides, it is often omitted from the [formal] agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others." 396 U.S. at 155. Thus, as this Court said in *P&LE*, *Shore Line* itself recognized that "not all working conditions to which parties may have agreed are to be found in written contracts." 109 S. Ct. at 2593, citing *Shore Line*, 396 U.S. at 154-55. The Seventh Circuit was entirely correct when it concluded that "with this understanding of 'practice' " as giving rise to implied agreements, "*Shore Line* is seen to be fully consistent with the proposition that the status quo is defined by the agreement of the parties * * *." (Pet. at 18a.) That "understanding" is altogether unremarkable, is supported by numerous decisions of this Court, and need not be reaffirmed yet again.

III. THE RULING BELOW THAT CONSUMMATION OF THE SALE CREATED ONLY A MINOR DISPUTE DOES NOT WARRANT REVIEW

The Seventh Circuit's third alternative holding, that C&NW's interpretation of its contractual authority was arguably correct, and that the unions' objections to the sale created only a minor dispute over which they could not lawfully strike, reaffirms the court's earlier ruling to the same effect on appeal from the preliminary injunction against the strike. (See Pet. at 55a.) RLEA's unsuccessful petition for review of that decision presented essentially the same question RLEA now presents with respect to this alternative holding. (See Petition for Certiorari, No. 88-464.)

RLEA asserts that the question has come to merit review because since *P&LE* and *ConRail* were decided a five-way inter-circuit conflict has arisen in the various line sale cases the unions have lost. (Pet. at 21-22.) RLEA further asserts that the decision below and the supposedly conflicting ones in other circuits *also* conflict with the dispute resolution procedures of the RLA by

depriving the unions of their right to bargain over the employment effects of lines sales. (*Id.* at 22-24.) There are no such conflicts, however.[19]

There is nothing novel about the minor dispute issue in this case. It frequently happens that, while a § 6 notice is pending under the major dispute procedures, the carrier will make a change that it believes is authorized by its existing agreements, and labor will claim that this action violates the status quo. Indeed, as happened here, a union may serve a § 6 notice after it learns of a proposed management change, seeking to provide the basis for a status quo claim.[20] It has long been well-settled, however, that the status quo includes the carrier's rights under existing agreements, for "to freeze physical conditions in existence on the day the Section 6 notice was filed," depriving the carrier of an existing contractual right to make unilateral changes, "would not

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[19] RLEA has asserted elsewhere that a more general confusion among the circuits exists over the application of the major/minor dispute dichotomy in all § 6 status quo cases, relying on the various opinions by the judges of the District of Columbia Circuit on that court's denial of *en banc* consideration in *ALPA* v. *Eastern Air Lines, Inc.*, 863 F.2d 891 (D.C. Cir. 1988), *cert. petition pending*, No. 88-1403. See *RLEA* v. *Chesapeake & Western*, S. Ct. No. 90-1131, Petition for Certiorari, p. 23. The question as to which those opinions noted a potential conflict among the circuits, however, is whether or not a minor dispute can exist *after the parties' collective bargaining agreements have expired.* See 863 F.2d at 899, 918 (Mikva, J., dissenting), 922 (Edwards, J., dissenting), 927 (Silberman, J., concurring). That question is not presented here; the minor dispute holding below was based on agreements that indisputably were in effect at the time of the Duck Creek South sale and remain in effect today.

[20] See, *e.g.*, *Rutland Ry.* v. *Brotherhood of Loc. Eng.*, 307 F.2d 21, 33 (2d Cir. 1962) ("Since a Section 6 notice is required by the statute in order to initiate a major dispute, the labor representatives are likely to serve such a notice * * * so as thereby to make" a controversy over a disputed unilateral action by the carrier "appear more like a major dispute"), *cert. denied*, 372 U.S. 954 (1963).

be a continuation of any prior existing condition. It would be the creation of a new condition." [21] *Shore Line* itself recognized this, for this Court was at pains there to note that, even though the written agreements did not address the carrier's right to make the challenged changes in work assignments, the union's service of a § 6 notice seeking an express prohibition of such changes "would not have barred the railroad from ordering the assignments * * * if, apart from the [written] agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions," *i.e.*, part of the parties' implied agreement. 396 U.S. at 153-54; see *P&LE*, 109 S. Ct. at 2593. Otherwise the status quo provision of § 6 would provide either party to a labor agreement with an instrument for unilateral destruction of the other's contractual rights, contrary to the RLA's mandate that the parties "maintain agreements," except as they are altered through subsequent agreements. 45 U.S.C. § 152 First.

Because a union cannot deprive a carrier of its contractual rights simply by serving a § 6 notice, where a union disputes an arguable or non-frivolous carrier claim of contractual authority to act during the status quo period, the status quo claim necessarily raises a minor dispute. By the plain terms of RLA § 3 First (i), *all* disputes over the "interpretation or application" of labor agreements are minor disputes. 45 U.S.C. § 153 First (i). Thus, in such a case, there are two separate, albeit re-

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[21] *Baker* v. *United Transp. Union*, 455 F.2d 149, 157 (3d Cir. 1971); see also, *e.g.*, *Shore Line*, *supra*, 396 U.S. at 153-54; *RLEA* v. *Boston & Maine Corp.*, 808 F.2d 150, 156 (1st Cir. 1986), *cert. denied*, 484 U.S. 830 (1987); *REA Express, Inc.* v. *Brotherhood of Ry., Airlines & S.S. Clerks*, 459 F.2d 226, 231 (5th Cir.), *cert. denied*, 409 U.S. 892 (1972); *United Transp. Union* v. *St. Paul U. Depot Co.*, 434 F.2d 220, 223 (8th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971); *Rutland Ry.*, *supra*, 307 F.2d at 34; *Hilbert* v. *Pennsylvania R.R.*, 290 F.2d 881 (7th Cir.), *cert. denied*, 368 U.S. 900 (1961).

lated, disputes: the § 6 notice gives rise to a *major* dispute over the proposed *new* agreement; but the union's status quo claim gives rise to a *minor* dispute over the parties' rights and obligations under the *existing* agreement.[22] The pendency of a major dispute over a proposed new agreement cannot transform a minor dispute over the carrier's rights under existing agreements into a major one.[23]

These commonplace principles are the basis for the minor dispute holding below. The court of appeals recognized that "the unions can make the railroad bargain over the effects of the Duck Creek South sale on the workers"; that the union notices were "in mediation, one of the minuettes in the [major dispute] quadrille"; and that the unions can strike in support of proper "effects" demands "once all peaceable means of dispute resolution have been exhausted." (Pet. at 15a, 14a, 24a.) Until then, however, the unions are "bound by the agreement[s]," which in the court's view supported C&NW's claim of contractual authority for the sale. (*Id.* at 19a, 24a.) Thus, the court did *not*, as RLEA claims, hold that the disputes over the unions' proposed changes in the agreements are minor, or in any way deprive the unions of their right to bargain over the effects of the sale, or rule out a strike if the unions exhaust the major dispute

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[22] See, *e.g.*, *Boston & Maine*, *supra*, 808 F.2d at 156; *REA Express*, *supra*, 459 F.2d at 226; *Rutland Ry.*, *supra*, 307 F.2d at 36; *Hilbert*, *supra*, 290 F.2d at 885. Of course, if during a major dispute a carrier takes action that is not arguably justified under the existing agreement, as where the carrier makes a change that is contrary to "the long-standing interpretation * * * which had been given by the parties to the existing agreement," the courts have jurisdiction to issue a status quo injunction under § 6. *Southern Ry.* v. *Brotherhood of Loc. Firemen & Enginemen*, 337 F.2d 127, 132 (D.C. Cir. 1964).

[23] See, *e.g.*, *Carbone* v. *Meserve*, 645 F.2d 96, 100 (1st Cir.), *cert. denied*, 454 U.S. 859 (1981); *Rutland Ry.*, *supra*, 307 F.2d at 33; *Hilbert*, *supra*, 290 F.2d at 885.

procedures on proper effects demands. (Pet. at 23-24.) The court held, rather, that RLEA's status quo claim presented a minor dispute over which the unions may not strike, because it stands or falls on C&NW's arguable claim of contractual authorization for the sale. "Filing a § 6 notice may kick off a major dispute" but "does not transform a minor dispute into a major one." (Pet. at 19a, 25a.)[24]

That is precisely the holding of the Fourth Circuit case that RLEA claims is in conflict with the decision below, *RLEA* v. *Chesapeake & W. Ry.*, *supra*, 915 F.2d at 120. (See Pet. at 23.) Moreover, none of the holdings in other line sale cases cited by the RLEA is to the contrary. In the Second and Third Circuit cases, the question was whether the carriers, in response to union status quo claims, had made arguable showings of contractual authority to consummate partial line sales "pending completion of bargaining under the [RLA] over the effects" of the sales on employees; the courts held that the carriers had met their burden and accordingly that the status quo claims raised minor disputes. *CSX Transp. Co.* v. *United Transp. Union*, *supra*, 879 F.2d at 992, 998-99; see *General Committee of Adjustment* v. *CSX R.R.*, *supra*, 893 F.2d at 585, 593. Both courts recognized, as did the court in this case, that a proposal by

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[24] RLEA claims that there can be no minor dispute in this case because there is "no disagreement" over the interpretation of the agreements. (Pet. at 12.) But RLEA persistently maintains that "line sales [are] neither authorized nor prohibited by the agreements" (Pet. at 8 n.11), while C&NW maintains that its implied agreements derived from its past practice of discontinuing operations on abandoned lines do affirmatively authorize other discontinuances, including line sales, and the court of appeals upheld that contention as arguably correct. (Pet. at 19a.) That *is* a minor dispute, although its merits are immaterial unless the court of appeals erred both in holding that the sale did not involve any change in working conditions and that the status quo is defined by the parties' agreements.

either party to change existing agreements governing rates of pay, rules, or working conditions gives rise to a major dispute. 879 F.2d at 996; 893 F.2d at 590.

Nor does the decision below conflict with the Eighth Circuit's holding in *RLEA* v. *Chicago & N.W. Transp. Co.*, *supra*, that union § 6 notices, insofar as they pertained to the effects of a line sale, gave rise to a major dispute rather than a minor one. 890 F.2d at 1026. There is no inconsistency between the holding in this case that a status quo controversy over the interpretation and application of *existing* agreements is a minor dispute, and the Eighth Circuit's holding that a controversy over the adoption of proposed *new* agreements is a major dispute.

In sum, the decision below is fully supported by decisions of this Court and plainly correct on all three grounds upon which it rests, although any one of those grounds is sufficient to support the judgment. Since this Court's decision in *P&LE*, every federal court that has dealt with a line sale case under the RLA has concluded that the sale did not violate the status quo, and that the unions could not lawfully strike to protest or prevent consummation. While the courts have arrived at those conclusions by a variety of routes, depending on the claims and defenses in the various cases, there are no conflicts in their holdings. Hence, in the year-and-a-half since *P&LE* the lower federal courts, with the aid of the decisions in *P&LE* and *ConRail*, have gone very far toward eliminating the labor strife over line sales that led this Court to grant certiorari in *P&LE*. There is no unfinished business in this area meriting this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 5, 1991